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# The German Parental-Leave System as a Model for California: Creating a Race to the Top within a Federal System

By DIRK LARSEN\*

## I. Introduction

When the U.S. Congress was drafting the Family and Medical Leave Act of 1993 (FMLA), it looked to Germany as an example of a country with generous family-leave policies as well as a strong economy.<sup>1</sup> Due to both opposition from the business sector and the United States' historical reluctance to regulate family life, however, the resulting legislation was much weaker than its German and other European counterparts, providing less generous benefits and protections with narrower coverage.<sup>2</sup>

Since the passage of the FMLA, Germany's social order has shown itself to be not as self-sustaining as it previously was or was thought to be. In particular, the country's low birthrate portends a social-security crisis, as fewer and fewer women leave work to have children. Those women who do are often tempted by the generous benefits—or prevented by societal and managerial attitudes—from returning to work, or at least from resuming their climb up the corporate ladder.

Despite Germany's problems, it can still serve as a model in the field of pregnancy and maternity leave—but for federal states within the United States. A U.S. state can attract immigration from other U.S. states in order to maintain the size and quality of its workforce. (While Germany cannot turn away fellow EU citizens, the language barrier makes their immigration less likely in the first place.) In addition, a U.S. state does not rely on a steady or expanding population to the extent that Germany must, as it is not

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1. See Mona L. Schuchmann, Note, *The Family and Medical Leave Act of 1993: A Comparative Analysis with Germany*, 20 Iowa J. Corp. L. 331, 332 (1995).

2. See generally *id.* at 332-52.

bound to provide the same degree of social benefits, especially to the elderly.

Specifically, this Note suggests that California could stand to benefit by adopting modified aspects of the German model. California historically has been one of the most progressive U.S. states in this area, providing maternity protection and benefits earlier and more generously than most other states. In addition, California's economy largely relies on the high-tech and related services industries, which in turn require skilled workers. By expanding maternity protections and benefits, the state conceivably could attract more skilled workers from other states, in effect creating an employees' race to the top (which could more than counteract any employers' race to the out-of-state bottom).

Part II of this Note lays out the analytical framework for assessing the relative merits, successes, and failures of Germany's and California's respective pregnancy- and maternity-leave policies. Part III assesses the results of the respective policies within this analytical framework. Part IV discusses which of Germany's parental-leave policies and measures would be feasible, palatable, and beneficial in California.

## **II. Analytical framework: Prevention of discrimination or protection of mothers and families?**

Examination of Germany's and California's pregnancy- and maternity-leave systems within their respective histories and social frameworks reveals that, while California's regulation aims primarily to prevent discrimination against women at work, Germany's policies are part of a larger system designed to protect, support, and promote the family.

The line between preventing discrimination and promoting families is blurred at best, and there is considerable overlap between the two. For example, a regulation requiring employers to provide reasonable accommodation for pregnant employees, a feature of each system, both prevents employers from firing—and thus discriminating against—female workers and also promotes the family in protecting the health of mother and fetus. And guaranteeing reinstatement to the previously held position after childbirth, another feature of each system, both prevents employers from discriminating against women who choose to have children and encourages working women to make this very choice.<sup>3</sup> Historical and

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3. See 2 C.C.R. 7291.9 (2005); BUNDESMINISTERIUM FÜR FAMILIE, SENIOREN, FRAUEN UND JUGEND [FEDERAL MINISTRY FOR FAMILY, SENIOR CITIZENS, WOMEN AND YOUTH AFFAIRS], MUTTERSCHUTZ: LEITFADEN ZUM MUTTERSCHUTZ [MATERNITY PROTECTION: GUIDE TO MATERNITY PROTECTION, hereinafter GUIDE TO MATERNITY PROTECTION], 10

societal factors show, however, that despite this overlap each system does lend itself to such classification, although Germany's has attempted to serve both purposes since the 1970s.

#### **A. Germany: Protection of the mother and promotion of families**

Germany's current pregnancy- and maternity-leave policies are the result of over 100 years of legislation aimed to protect the health of the working woman, to ensure her ability to care for her children—and thus to promote families—and only later to afford her the same rights in the workplace afforded to her male colleagues.

##### *1. Historical background*

Germany's pregnancy- and maternity-leave policies have their origin in the late nineteenth century, as Chancellor Otto von Bismarck attempted to perpetuate Prussia's paternalistic, feudal system through the development of social legislation.<sup>4</sup> Rejecting the laissez-faire doctrine, Bismarck (and his sometime Social Democratic allies) envisioned a social state that protected and provided for its citizens according to the class-based Prussian model.<sup>5</sup>

The first *Mutterschutzgesetz* (literally 'Maternity Protection Act,' commonly translated as 'Maternity Leave Act') was passed in 1878 to prohibit all women from working underground, and factory women from working within three weeks of giving birth.<sup>6</sup> Insurance funds began paying approximately one-half of the new mother's lost wages beginning in 1883.<sup>7</sup> The leave period was increased to six weeks in 1891, and in 1908 eight weeks during pregnancy were added, with both increases viewed as health measures at the time of their passage.<sup>8</sup>

Throughout this same period, more and more women began working in factories, and more and more became active in the Social Democratic Women's Movement.<sup>9</sup> But their focus was on women's welfare rather than women's rights—in accordance with their male Social Democratic

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(2004); MUTTERSCHUTZGESETZ [MATERNITY PROTECTION ACT, hereinafter MuSchG] § 9 (F.R.G. 2002).

4. Schuchmann, *supra*, at 335 n.1.

5. *See id.*

6. UTE FREVERT, WOMEN IN GERMAN HISTORY: FROM BOURGEOIS EMANCIPATION TO SEXUAL LIBERATION 93 (Stuart McKinnon-Evans trans., Berg Publishers Ltd. 1st English ed. 1989) (1986).

7. *Id.*

8. *Id.* at 145.

9. *See id.* at 92, 139.

counterparts who, like the center and right-wing parties, believed that a woman's place was in the home, bearing and caring for children.<sup>10</sup> The First World War brought even more women into the factories to replace the men who left for the front.<sup>11</sup> Concerns over an already declining birthrate, however, focused legislation and social activism on welfare centers, housing, the encouragement of families, and health care.<sup>12</sup>

The Weimar Constitution of 1919—much of which is the model for the current *Grundgesetz* (Basic Law or Constitution)—recognized the equality of the sexes as a basic right.<sup>13</sup> However, even the women's movement emphasized that this was an equality in value, not in kind.<sup>14</sup> The increasing number of women entering the white-collar workforce in the 1920s expected—and were expected—to give up their jobs for motherhood once they married, and most fulfilled these expectations.<sup>15</sup>

The National Socialists came to power in 1933 with the goal of getting women out of the labor market and back into the home, where they would produce German children.<sup>16</sup> The ensuing mobilization for and waging of war, however, actually resulted in an increase in the number of working women.<sup>17</sup> Despite this, the National Socialists did expand the *Mutterschutz* to cover more workers, and extended the leave time to six weeks on either side of birth—with full pay.<sup>18</sup> They also supported and promoted increased day-care and pre-school opportunities for working women in order to make it easier for them to have families.<sup>19</sup>

After the devastation of the Second World War, these families were left as one of the few remaining stable institutions in Germany.<sup>20</sup> More women were thus ready to accept family life; in 1950, a lower percentage of women worked outside the home than in 1930.<sup>21</sup> In 1952, *Mutterschutz* covered the last six weeks of pregnancy and the first eight after birth, with full pay—but not to encourage women to work.<sup>22</sup> However, as the *Wirtschaftswunder* (Economic Miracle) generated more wealth in the

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10. *Id.* at 141, 144.

11. *Id.* at 151-58.

12. *Id.* at 158.

13. *Id.* at 170.

14. *Id.*

15. *Id.* at 177-83.

16. *Id.* at 218.

17. *Id.* at 222-24.

18. *Id.* at 224.

19. *See id.* at 225, 230.

20. *Id.* at 265.

21. *Id.* at 266.

22. *Id.* at 284.

Federal Republic, more women went back to work to get a piece of it for themselves and their families.<sup>23</sup>

In this same period, the German Democratic Republic actually implemented equal rights (or the lack of discrimination) in employment as part of a general program aimed, ostensibly at least, at social equality.<sup>24</sup> One component of this program was maternity leave far more generous than that available in the Federal Republic, but in the East with the professed purpose of promoting equal rights rather than the family unit.<sup>25</sup>

The New Women's Movement of the 1970s in the Federal Republic grew out of an increasing realization that the life of a housewife may be less than entirely fulfilling for all women.<sup>26</sup> Unlike the "old" women's movement, its focus was not on protecting and promoting motherhood, but on attaining equal rights without distinction in roles—including at work.<sup>27</sup> The skyrocketing enrollment of women in higher education was one indicator of the movement's success, along with the consciousness-raising and resulting widespread support for equal rights.<sup>28</sup> Another was the change in maternity leave to allow both fathers and mothers to take up to one year away from work.<sup>29</sup>

However, the financial crisis of the late 1970s resulted in a backlash against this movement.<sup>30</sup> While the gains it made were not reversed—especially in German society's continuing support for equal rights—the conservative government of the 1980s returned to an emphasis on home and family.<sup>31</sup>

## 2. *The system today*

Germany's pregnancy- and maternity-leave policies are still governed by the *Mutterschutzgesetz*. This act's protections begin to take effect as soon as the employee receives the *Mutterpaß* (maternity pass) from her physician, which confirms her pregnancy and contains a detailed medical record of the pregnancy's progress.<sup>32</sup> From this moment on, the expecting

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23. *Id.* at 268-69.

24. *Id.* at 283.

25. *Id.* Encouraging mothers to work also enabled the East German state to play a much larger role in the rearing and education of the children.

26. *Id.* at 273.

27. *Id.* at 292.

28. *Id.* at 293, 295-98.

29. *Id.* at 295.

30. *Id.* at 298.

31. *Id.* at 299.

32. And which the expectant mother must keep with her at all times in case she requires immediate medical attention. For a detailed description of the

employee cannot be terminated from her position.<sup>33</sup> Her employer must also accommodate her condition to a great extent, structuring her workplace and duties in such a way as to prevent any risk of stress or strain to the woman or fetus.<sup>34</sup> If the expectant mother cannot work at all due to her condition, she does not have to; in fact, she is not permitted to work in the last six weeks of her pregnancy.<sup>35</sup> The focus of these protections—and of the overall system of which they form a part—is to protect the mother and thus promote the health (and possibly the growth) of the family.<sup>36</sup>

As mentioned above, the employee stops working altogether six weeks before her child's due date. This period of leave is extended for an additional six to eight weeks following birth, depending on the mother's condition.<sup>37</sup> Her existing health-insurance provider pays a portion of her salary during this period.<sup>38</sup> Her employer pays the rest up to her full salary (including any raises she is scheduled to receive).<sup>39</sup> The obvious burden on smaller companies is alleviated at least partially by a federal insurance program into which companies with fewer than twenty employees pay in return for assistance in covering the extra costs—such as replacement or overtime costs—arising during an employee's maternity leave.<sup>40</sup> If the employer cannot pay at all due to insolvency, the federal government picks up the tab.<sup>41</sup> The government also fills the gaps if the mother has no qualifying health insurance.<sup>42</sup> While the maternity leave itself lasts six to eight weeks after childbirth, the protection against termination lasts four months after birth.<sup>43</sup> If the mother chooses to return to work, the child's health is additionally safeguarded by the lactation breaks that the employer must provide.<sup>44</sup>

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*Mutterpaß*, see Eltern.de [Parents.de], *Mutterpaß*, at <[www.eltern.de/schwangerschaft\\_geburt/schwanger\\_sein/mutterpass/](http://www.eltern.de/schwangerschaft_geburt/schwanger_sein/mutterpass/)> (visited Mar. 10, 2005).

33. See MuSchG § 9.

34. See *id.* § 4.

35. See *id.* § 3(2).

36. Wolfgang Tietze and Debby Cryer, *The Silent Crisis in U.S. Child Care: Current Trends in European Early Child Care and Education*, 563 *Annals* 175, 184 (1999).

37. See MuSchG §§ 3, 6, 11-17.

38. See *id.* § 13.

39. See *id.* § 14.

40. GUIDE TO MATERNITY PROTECTION, *supra*, at 37 n.3.

41. See MuSchG § 14.

42. See *id.* § 13(2).

43. See *id.* § 9.

44. The employed mother can choose between two half-hour breaks or one break lasting an entire hour. MuSchG § 7(1).

### 3. *Social framework*

The *Mutterschutz* in Germany is one part of a comprehensive social system designed to promote the health and welfare of the entire society, and to promote the propagation of the society to the extent necessary to maintain the social system. Substantial incentives and protections are provided to parents beyond the *Mutterschutz* itself. The *Gesetz zum Erziehungsgeld und zur Elternzeit* (Parental Leave Act) mandates that either parent can take a leave from work of up to three years.<sup>45</sup> The parent's position is guaranteed during this time.<sup>46</sup> A parent who takes advantage of this offer and who does not work more than thirty hours per week in any position receives *Erziehungsgeld* (roughly 'parental allowance') from the federal government – meaning he or she is essentially being paid to be a parent.<sup>47</sup> Effective January 1, 2001, both new mothers and fathers have a right to work part time while taking parental leave.<sup>48</sup> In addition to the *Erziehungsgeld*, every family receives approximately EUR 150/month of *Kindergeld* (child allowance) until the child is at least eighteen, or even later if the child is not self-supporting at that age.<sup>49</sup>

Beyond parenthood, the German government provides for a comprehensive social-welfare system including health insurance, unemployment protection, social security, etc.<sup>50</sup> This system relies on the *Generationsvertrag* (generational contract): each able-bodied working generation pays for the benefits of the younger and older generations as well as of the less able-bodied.<sup>51</sup> The system thus depends on a birthrate that supplies enough future generations to provide for the present and soon-to-be past ones.

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45. GESETZ ZUM ERZIEHUNGSGELD UND ZUR ELTERNZEIT [PARENTAL LEAVE ACT, hereinafter BERzGG] § 15(1)-(2) (F.R.G. 2004).

46. *Id.* § 18(1).

47. *Id.* § 2. The standard subsidy is EUR 450/month for the first twelve months, somewhat less thereafter. Since wages in Germany are substantially lower than in California – and taxed at a much higher rate – this sum is temptation enough for many not to return to work.

48. See BERzGG § 15(4),(5) (2004). For more details, see <[www.abc-recht.de/ratgeber/familie/tipps/recht\\_elternzeit.php](http://www.abc-recht.de/ratgeber/familie/tipps/recht_elternzeit.php)> (visited Mar. 10, 2005).

49. BUNDESANSTALT FÜR ARBEIT [FEDERAL LABOR OFFICE], MERKBLATT KINDERGELD [CHILD ALLOWANCE FACT SHEET] 4-6, 15 (F.R.G. 2003).

50. For an in-depth description of Germany's economic and social system, see HEINZ LAMPERT, DIE WIRTSCHAFTS- UND SOZIALORDNUNG DER BUNDESREPUBLIK DEUTSCHLAND [THE ECONOMIC AND SOCIAL ORDER OF THE FEDERAL REPUBLIC OF GERMANY] (F.R.G. 13th ed. 2001).

51. '*Generationsvertrag*' is the word under which the foundation for West Germany's pension system has become popular. See Karl Moersch, *Erst Renten, dann Rüstung* [First Pensions, Then Armament], FRANKFURTER ALLGEMEINE ZEITUNG, October 11, 2003, at 8.



## ***B. California: Prevention of discrimination***

California's system of pregnancy and maternity leave consists of a hodgepodge of federal and state regulations that, taken together, begin to approximate Germany's *Mutterschutzgesetz*—but at a much lower level. Even so, this system makes California one of the more progressive U.S. states in this respect, however short it may fall of Germany's (and Europe's) standards. But unlike Germany, California aims to eradicate discrimination against women in the workplace, rather than to promote the health of the mother and the family.

### *1. Historical background and current system*

California's history of pregnancy and maternity leave is not as long and complex as Germany's, nor does it find its origins in an attempt to perpetuate a pre-modern social structure through modern social legislation.

Beginning in the 1930s, working women in the United States demanded equal rights at work, including the right to freedom from pregnancy-related discrimination.<sup>52</sup> Initial efforts emphasized both the protective and the anti-discriminatory aspects, and they resulted in some success for union members.<sup>53</sup> But non-union members were left without guaranteed job protection and pay if they became pregnant or took maternity leave.<sup>54</sup> Leaders of the movement for reform emphasized the social value of pregnancy and maternity—something to be protected and fostered, as in Europe—but their slow successes came only with pregnancy classified as a “disability.” Pregnant women were thus provided with protection against discrimination based upon their “disability,” rather than any affirmative rights.<sup>55</sup>

In 1978, the U.S. Congress modified Title VII of the Civil Rights Act of 1964 to prohibit employers from terminating employees on the basis of pregnancy.<sup>56</sup> In that same year, California passed a law requiring all employers with more than five employees to provide pregnancy disability leave of up to four months; the law thus provides broader protection than the modified Title VII, which applies only to employers of fifteen or more.<sup>57</sup>

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52. DOROTHY SUE HOBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 127-28 (2004).

53. *Id.* at 127-30.

54. *Id.*

55. *Id.*

56. See 42 U.S.C. § 2000e *et seq.* (2004).

57. See CAL. GOV'T CODE § 12900 *et seq.* (West 2004) (pregnancy disability leave statute) and 2 C.C.R. § 7291.2(h) (2004) (coverage of both Title VII and non-Title VII

The current version of this law and its implementing regulations protect against discrimination on the basis of pregnancy by providing that eligible employees may take a “pregnancy disability leave” of up to four months without risk of losing their position.<sup>58</sup> Before starting their leave, the employers must provide “reasonable accommodation” at the workplace, but do not have to create a new position for the pregnant employee.<sup>59</sup> During the leave period, state-mandated, employee-funded disability insurance pays approximately 55% of the employee’s salary— compared to Germany’s 100%.<sup>60</sup>

Pregnancy disability leave in California is taken in addition to any leave periods provided under the California Family Rights Act (CFRA).<sup>61</sup> The CFRA is California’s version of the federal FMLA, which applies only to employers engaged in “commerce.”<sup>62</sup> Each act provides for unpaid medical leave in order to take care of a family member, including newborn child.<sup>63</sup> However, both the CFRA and FMLA apply only to companies with at least fifty employees, meaning that California’s pregnancy disability leave has a much broader reach.<sup>64</sup> Pregnancy leave in California is concurrent with, rather than in addition to, any FMLA leave.<sup>65</sup> But if both the CFRA and FMLA are applicable to any employee—as is likely to be the case, since companies with fifty or more employees are likely involved in interstate commerce—then the more generous state provisions apply.<sup>66</sup>

A pregnant woman working for a company with at least five

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employers). California’s act survived a challenge to its validity as providing more protection against discrimination than the modified Title VII. In *California Federal Savings and Loan Association v. Guerra*, the U.S. Supreme Court held that the modified Title VII provides a floor beneath which employers may not go, but that states are free to provide additional anti-discrimination measures as they see fit. See *Cal. Fed. Sav. and Loan Ass’n v. Guerra*, 479 U.S. 272 (1987).

58. See CAL. GOV’T CODE § 12945 (West 2004), 2 C.C.R. § 7291.7 (2004) (name and duration of leave); 2 C.C.R. § 7291.9 (2004) (guaranteed reinstatement).

59. 2 C.C.R. § 7291.5 (2004).

60. State of California, Employment Development Department, *Disability Insurance: About the DI Program*, at <[www.edd.ca.gov/direp/diind.htm](http://www.edd.ca.gov/direp/diind.htm)> (visited Mar. 10, 2005).

61. 2 C.C.R. § 7291.13(a) (2004).

62. The Family and Medical Leave Act of 1993 is codified at 29 U.S.C. § 2611 *et seq.*; for a definition of its applicability, see 29 U.S.C. §§ 2611(1) and 2611(4)(A)(i).

63. See generally CAL. GOV’T CODE §§ 12945.2, 19702.3 (West 2004) (incorporating the California Family Rights Act of 1992); 29 U.S.C. § 2611 *et seq.* (2004) (incorporating the Family Medical Leave Act of 1993).

64. CAL. GOV’T CODE § 12945.2(c)(2)(A) (West 2004); 29 U.S.C. § 2611(4)(A)(i) (2004).

65. 2 C.C.R. § 7291.12(a) (2004).

66. 29 U.S.C. § 2651(b) (2004) (FMLA does not supersede more generous state law).

employees in California is thus entitled to at least four months of partially paid pregnancy disability leave. If the company has fifty or more employees, she may be entitled to CFRA family leave in addition to the pregnancy disability leave. In a program that took effect in 2004, she can also receive approximately 55% of her salary during the family leave period, making California the first state in the nation to offer paid family leave.<sup>67</sup>

In addition to their history, the very terms of these policies demonstrate their anti-discriminatory orientation. Both pregnancy disability leave and the CFRA are part of California's larger Fair Employment and Housing Act.<sup>68</sup> Both are enforced by the Fair Employment and Housing Commission.<sup>69</sup> In addition, both the CFRA and the pregnancy-disability leave provisions are located in the "Discrimination Prohibited" subchapter of the Fair Housing and Employment part of the California Government Code.<sup>70</sup> It is also worth noting that pregnancy is a "disability" in California,<sup>71</sup> while in Germany it is a protected and promoted condition integral to the planned social order.<sup>72</sup> In California, pregnancy is simply treated like other "disabilities" in that it may not supply the basis for employment discrimination.

## 2. Social framework

In stark contrast to Germany, California does not provide a comprehensive social-welfare system meant to provide a safety net for all of its citizens. Public health insurance is provided only for low-income

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67. State of California, Employment Development Department, *Frequently Asked Questions about Paid Family Leave*, at <[www.edd.ca.gov/direp/pflfaq1.asp](http://www.edd.ca.gov/direp/pflfaq1.asp)> (visited Mar. 10, 2005). This mandatory insurance plan tied into the state disability insurance program provides six weeks of benefits.

68. Both the Civil Rights Amendment of 1999, which provides for the current version of pregnancy disability leave, and the CFRA of 1992 are part of the Fair Employment and Housing Act, located at CAL. GOV'T CODE § 12900 *et seq.*

69. CAL. GOV'T CODE §§ 12945(a), 12945.2(a) (West 2004).

70. See CAL. GOV'T CODE § 12900 *et seq.*, which contains this "Discrimination Prohibited" subchapter.

71. Not only is the leave given called "pregnancy disability leave," the relevant statute defines the affected time period as the "period during which the female employee is disabled on account of pregnancy[.]" CAL. GOV'T CODE § 12945(a) (West 2004). The pre-2004 version stated that "pregnancy . . . [is] treated as any other temporary disability." § 12945(a) (superseded 2004). Further, the partial salary the leave-taking employee receives during pregnancy is part of the state's standard disability insurance program, which applies to any non-work related "disability."

72. It is also largely a health issue. Much of the *Mutterschutzgesetz* focuses on protecting the mother's (and fetus's) health, even requiring the employer to provide paid time for prenatal examinations. See MuSchG § 16.

residents and often requires contributions from the insured.<sup>73</sup> While the State of California provides pension plans for public employees and regulates them for private companies, it does not provide a counterpart to the federal Social Security Administration, the United States' blanket pension plan. The most obvious reason for this difference is that, unlike Germany, California is a state within a federal system and as such does not need to provide what the federal government provides—and thus does not need to rely on a *Generationsvertrag*. Another, perhaps more fundamental, reason is that the people of California (and the rest of the United States) are not likely to *want* to create a system relying so heavily on a *Generationsvertrag* (with the obvious exception of Social Security). The extensive structuring of and support for family life in Germany would likely represent an unwanted intrusion into family matters for many Californians. In short, the role of government in California is much more acceptably viewed as preventing negatives than promoting positives.

Despite this general attitude, recent measures in California, while still generally classifiable as anti-discrimination, do seem to promote the ability of working women to have families (rather than to protect childbearing women from discrimination). One is the paid family leave mentioned above, which also includes leave for bonding with a newborn or adopted child.<sup>74</sup> Another is the law, passed in 2001, requiring employers to give breastfeeding mothers reasonable, unpaid or concurrent break time for expressing milk. These measures suggest a move away from simple anti-discrimination—preventing harassment or termination—to a broader view that sees discrimination in the forced choice between family and career.

### III. Success of each system based on its own goals

#### A. Germany

While there is little contention that German mothers and fetuses are not well protected, this protection has not led to a promotion of the family. Instead, the German birthrate has been falling for years and currently stands at 1.3 children per couple, far too low to sustain the population and thus the social system.<sup>75</sup> The year 2003 saw the first year of an actual population decline since 1950, after over ten years of continually

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73. For more information about California's Medi-Cal program, see <[www.medical.ca.gov](http://www.medical.ca.gov)> (visited Mar. 10, 2005).

74. State of California, Employment Development Department, *Frequently Asked Questions about Paid Family Leave*, *supra* n.67.

75. Mark Landler, *Empty Maternity Wards Imperil A Dwindling Germany*, N.Y. TIMES, Nov. 17, 2004, at A1.

decreasing growth.<sup>76</sup>

One reason for this declining birthrate may lie in the at least partial success of the feminist movement of the 1970s and the anti-discrimination measures and attitudes it fostered. Since 1970, more women have been entering the workforce and fewer have been marrying.<sup>77</sup> Whether married or not, women having children are having them at a later age and thus having fewer overall.<sup>78</sup> In addition, working women are attaining a higher standard of living for both themselves and their partners, one that they may be reluctant to give up for the uncertain path of parenthood.<sup>79</sup>

Unlike California, Germany cannot or will not rely on immigration to swell the ranks of its labor force and help fulfill the *Generationsvertrag*. The open borders of the European Union may eventually result in more immigration, but it is less likely to be permanent. In addition, while Germany is widely perceived as having a very generous social welfare system, all EU member states must provide a minimum level of social benefits and security, thus making Germany's system comparably less attractive. Unlike its EU neighbors England and France, Germany never possessed significant overseas colonies, has therefore not historically encouraged immigration, and is not an "immigration country."<sup>80</sup> This topic

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76. Statistisches Bundesamt [Federal Statistics Office], *Bevölkerungsentwicklung in Deutschland: 1991-2003* [Population Development in Germany: 1992-2003], (F.R.G. 2004) at <[www.destatis.de/download/d/bevoe/bev\\_91\\_03\\_graf.pdf](http://www.destatis.de/download/d/bevoe/bev_91_03_graf.pdf)> (visited Mar. 10, 2005).

77. Since 1970, there has been a more or less steady decline in the number of marriages entered into each year in Germany, from 575,233 in 1970 to 382,911 in 2003. In the same period, the number of births per year dropped from 1,047,737 to 706,721 (although the number of out-of-wedlock births increased from 80,769 to 190,641). Statistisches Bundesamt [Federal Statistics Office], *Zusammenfassende Übersichten: Eheschließungen, Geborene und Gestorbene: Deutschland* [Summarized Tables: Marriages, Births and Deaths: Germany], (F.R.G. 2004) at <[www.destatis.de/download/d/bevoe/lanereihe04.xls](http://www.destatis.de/download/d/bevoe/lanereihe04.xls)> (visited Mar. 10, 2005).

78. From 2001-2003 alone, the number of births by women twenty-eight years old and younger decreased, while the number of births by women aged twenty-nine to forty-three increased each year. Statistisches Bundesamt [Federal Statistics Office], *Tabelle 12612-0102, Geburtsziffern: Deutschland, Jahr, Altersjahre: 2001-2003* [Table 12612-0102, Birth Figures: Germany, Year, Ages: 2001-2003], (F.R.G. 2004) at <[www.destatis.de/](http://www.destatis.de/)> (visited Mar. 10, 2005). In the same period, the average age of a first-time married mother increased from 29.2 to 29.4, and of a first-time unmarried mother from 27.5 to 27.7. Statistisches Bundesamt [Federal Statistics Office], *Durchschnittliches Alter der Mütter bei der Geburt ihrer lebendgeborenen Kinder* [Average Age of Mothers at the Birth of Her Living Children], (F.R.G. 2004) at <[www.destatis.de/basis/d/bevoe/bevoetab2.php](http://www.destatis.de/basis/d/bevoe/bevoetab2.php)> (visited Mar. 10, 2005).

79. Dandler, *supra* n.75.

80. Germany currently has 7,344,765 foreign residents (roughly 9% of the overall population), but only approximately 2 million of them have unrestricted residency permits. Statistisches Bundesamt [Federal Statistics Office], *Ausländische Bevölkerung in Deutschland nach Aufenthaltsstatus und Duldung am 31.12.2003* [Foreign Population in

has generated a great deal of debate in recent years as Germany's birthrate problem has become increasingly apparent. A recent proposal to grant temporary visas only to skilled IT workers—who would hopefully command high salaries and thus pay high taxes—met with a great deal of opposition, which preferred "*Kinder statt Inder*" ('Children instead of Indians'—India being the perceived source of these IT experts).<sup>81</sup>

While *Mutterschutz* and the related measures have done very little to combat Germany's falling birthrate, they have contributed to a society in which women have the freedom to pursue a career. However, even this apparent success in prevention of discrimination is limited: the general trend is that while more and more women work and study, a proportional number are not breaking out of traditional "women's" occupations into male-dominated fields or top management.

In 1950, 44.4% of working-age German women actually worked outside of the home.<sup>82</sup> By 1980, this number had increased to 52.9%,<sup>83</sup> and to 65.1% by 2003.<sup>84</sup> Roughly 60% of these women work as white-collar employees.<sup>85</sup> However, only approximately one-third of professional/managerial positions are occupied by women.<sup>86</sup> More tellingly, women and men under thirty years of age are equally represented in management relative to their presence in the labor force, but after that point men are roughly twice as likely as women to reach management positions.<sup>87</sup>

Large numbers of women are also entering universities and apprenticeships. From 2001-2003, nearly half of all university graduates were women,<sup>88</sup> and 40% of all women participated in an apprenticeship

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*Germany by Residence Status and Leave to Remain as of 12/31/2003*], (F.R.G. 2004) at <[www.destatis.de/basis/d/bevoe/bevoetab9.php](http://www.destatis.de/basis/d/bevoe/bevoetab9.php)> (visited Mar. 10, 2005). The rest are, in theory, expected to leave at some point.

81. See Tina Hildebrandt, *Auf dem Grat [Walking the Line]*, DER SPIEGEL, Mar. 19, 2001, at 30.

82. FREVERT, *supra* at 333 n.6..

83. *Id.*

84. Statistisches Bundesamt [Federal Statistics Office], *Erwerbstätigkeit: Deutschland [Employment: Germany]*, (F.R.G. 2004) at <[www.destatis.de/basis/d/erwerb/erwerbtbl1.php](http://www.destatis.de/basis/d/erwerb/erwerbtbl1.php)> (visited Mar. 10, 2005).

85. Roughly 60% of women work as white-collar employees. *Id.*

86. Statistisches Bundesamt [Federal Statistics Office], *Mitteilung für die Presse, Mikrozensus 2000: Männer fast doppelt so häufig als Führungskräfte tätig wie Frauen [Press Release, Microcensus 2000: Almost Twice as Many Men as Women in Management]*, (F.R.G. 2001) at <[www.destatis.de/presse/deutsch/pm2001/p1440031.htm](http://www.destatis.de/presse/deutsch/pm2001/p1440031.htm)> (visited Mar. 10, 2005).

87. See Statistisches Bundesamt, *Erwerbstätigkeit: Deutschland*, *supra* n.84.

88. Statistisches Bundesamt [Federal Statistics Office], *Frauenanteile in verschiedenen Stadien der akademischen Laufbahn [Women at Various Stages of the Academic Path]*,

program to learn a professional trade.<sup>89</sup> During the same period, however, women made up only about one-third of doctoral recipients and just 12% of professors.<sup>90</sup> Women in universities are also concentrated in traditionally “women’s” fields such as German, English, Romance Languages, Pedagogy, and Psychology—where the primary career opportunity is teaching, which is not in very high demand given the current birthrate.<sup>91</sup> Far fewer women pursue studies and careers in today’s more high-demand fields such as Electrical Engineering and Computer Sciences.<sup>92</sup> Of all women participating in an apprenticeship program, 72% are concentrated in “women’s” fields such as office administrative support, health-care support, and restaurant/retail.<sup>93</sup>

The wage ratio of working women to men in Germany is approximately 75% for the private commercial/services sector (the sector with the largest concentration of female employees).<sup>94</sup> It is also approximately 75% for the wholesale and retail sectors, and 63% for manufacturing.<sup>95</sup> As noted below, this is well above California’s ratio of just 63.2% relative to non-Hispanic white men but below California’s ratio of 80.7% when all men are factored in.<sup>96</sup>

While the above figures suggest some degree of success in the fight against discrimination at work, a great deal of residual discrimination remains—especially from male-dominated higher management.<sup>97</sup> For those women who decide to have children, the generous period of *Mutterschutz* and *Erziehungsurlaub* (parental leave) often means the end of the career—right at the age when their male colleagues are beginning to

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(F.R.G. 2004) at <[www.destatis.de/basis/d/biwiki/hochtab8.php](http://www.destatis.de/basis/d/biwiki/hochtab8.php)> (visited Mar. 10, 2005).

89. Statistisches Bundesamt [Federal Statistics Office], *Berufliche Bildung* [Professional Training], (F.R.G. 2004) at <[www.destatis.de/basis/d/biwiki/beruftab1.php](http://www.destatis.de/basis/d/biwiki/beruftab1.php)> (visited Mar. 10, 2005).

90. Statistisches Bundesamt, *Frauenanteile in verschiedenen Stadien der akademischen Laufbahn*, *supra* n.88.

91. Annette Bruhns, Simone Kaempf, Alexandra Rigos & Susanne Weingarten, *Die heimliche Revolution* [The Secret Revolution], DER SPIEGEL, June 21, 1999, at 84.

92. *Id.*

93. Statistisches Bundesamt [Federal Statistics Office], *Auszubildende in den 20 am stärksten besetzten Ausbildungsberufen 2003: Weibliche Auszubildende* [Apprentices in the 20 Most Popular Trades: Female Apprentices], (F.R.G. 2004) at <[www.destatis.de/basis/d/biwiki/beruftab3.php](http://www.destatis.de/basis/d/biwiki/beruftab3.php)> (visited Mar. 10, 2005).

94. Statistisches Bundesamt [Federal Statistics Office], *Durchschnittliche Bruttoverdienste in Deutschland* [Average Gross Incomes in Germany], (F.R.G. 2004) at <[www.destatis.de/themen/d/thm\\_loehne.php](http://www.destatis.de/themen/d/thm_loehne.php)> (visited Mar. 10, 2005).

95. *Id.*

96. INSTITUTE FOR WOMEN’S POLICY RESEARCH, THE STATUS OF WOMEN IN THE STATES 23, 26 (2004), at <[www.iwpr.org/States2004/PDFs/National.pdf](http://www.iwpr.org/States2004/PDFs/National.pdf)> (visited Mar. 10, 2005).

97. Bruhns, *supra* at 86 n.91.

climb the corporate ladder.<sup>98</sup> One result is that, of those women who have managed to attain a managerial position, 40% are single.<sup>99</sup>

The terms of *Mutterschutz* and *Erziehungsurlaub* are also so generous that many businesses—especially small businesses—are reluctant to hire women of childbearing age. Government aid and insurance are available to help cover the facial costs of the paid leave.<sup>100</sup> But the actual costs of finding, selecting, and hiring a suitable replacement, one who is then protected from termination in a rigid labor market, form a significant deterrent to many companies.<sup>101</sup> Such discrimination against women is not legal, but is widely practiced and accepted—many women even volunteer their family plans (or lack thereof) in job interviews.<sup>102</sup>

Conversely, the terms of *Mutterschutz* and *Erziehungsurlaub* are so generous that only half of the 400,000 women who take time off each year to raise children ever return to their career.<sup>103</sup> And in West Germany before reunification, only 9% of women return to work before their children are three years old (compared to 23% in the former East Germany).<sup>104</sup> Many women who do return face unwelcome questions about their dedication to their children.<sup>105</sup> In addition, despite the

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98. *Id.*

99. Anke Dürr & Claudia Voigt, “Wie schafft ihr das bloß?” [“How Do You Manage?”], *DER SPIEGEL*, Jan. 5, 2004, at 49.

100. See *MuSchG* §§ 13, 14.

101. See generally Horand Knaup, *Teure Auszeit [Expensive Time-out]*, *DER SPIEGEL*, Nov. 8, 2004, at 74. Germany’s comprehensive social system also includes extensive regulation of the labor market, including protection against termination. The *Kündigungsschutzgesetz* (Termination Protection Act) provides that an employer can only terminate a full-time employee for the employee’s own violations, in the event of dire financial need, or if eliminating the position itself. *KÜNDIGUNGSSCHUTZGESETZ* [TERMINATION ACT, hereinafter *KSchG*] § 1 (F.R.G. 2004). Qualified applicants are furnished by a comprehensive apprenticeship system in addition to the universities. By roughly the age of sixteen, each young German decides whether to continue on an academic path — primarily to teaching, business, law or medicine — or to learn a trade. The next four to ten years are then spent learning that profession/trade, qualifying the person for little other than that particular career. The combined effect of the *Kündigungsschutz* and the educational system is to create a well-defined but rigid labor market in which positions are difficult to fill and, once filled, are very difficult to unfill.

102. The German *ARBEITSRECHTLICHES EG-ANPASSUNGSGESETZ VOM 13/08/1980, BUNDESGESETZBLATT TEIL I VOM 13/08/1980, SEITE 1308* [EC EMPLOYMENT ADAPTATION ACT OF 8/13/1980, FEDERAL LAW GAZETTE PART 1 OF 8/13/1980, PAGE 1308] (F.R.G.) implements EEC Directive 76/207/EEC (the Equal Treatment Directive), which provides that “there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.”

103. Susanne Fischer, *Lila Botschaft [Purple Message]*, *DER SPIEGEL*, June 12, 2000, at 43.

104. Dürr, *supra* at 49 n.99.

105. *Id.* Three-quarters of West Germans believe that children are best raised with the



guaranteed reinstatement, many mothers find that their actual job has long ago been taken by someone else, essentially forcing them to start over in the same company.<sup>106</sup> (While fathers can also take *Erziehungsurlaub*, very few do so—a steady 2% over the past few years.)<sup>107</sup>

In sum, the measures taken to enable working German women to have families have not encouraged many to do so. On the other hand, those that have chosen to do so often find that they face difficulties in returning to their lives as working women.

## B. California

In many respects, the picture of women in the labor force in California is very similar to that of Germany—despite the often divergent goals for the maternity-leave policies. The birthrates are also similar if only native-born Californians are considered. The crucial difference is that roughly half of Californians come from somewhere else, thus enabling the state to grow regardless of the declining number of in-state births.

Fifty-six percent of working-age California women actually worked outside the home in 2000 (compared to 65% in Germany in 2003).<sup>108</sup> That amounts to 45.1% of the labor force,<sup>109</sup> which represents an increase from 43.4% in 1990.<sup>110</sup> The 56% of California women in the labor force in 2000 also represents an increase from 1980's 52.6%, but a slight drop from 1990's 57.7%.<sup>111</sup> In 2000, 38% of employed women in California held a managerial or professional position, placing the state in the top quarter of the United States in that respect.<sup>112</sup> This figure is also significantly higher

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mother at home – despite evidence to the contrary.

106. Knaup, *supra* at 74 n.101.

107. Dürr, *supra* at 49 n.99.

108. INSTITUTE FOR WOMEN'S POLICY RESEARCH, *supra* at 27 n.96 (California ranked 37th in the United States).

109. U.S. Census Bureau, *Profile of Selected Economic Characteristics: 2000: California*, (2000) at <factfinder.census.gov/servlet/QTTable?\_bm=n&\_lang=en&q\_r\_name=DEC\_2000\_SF3\_U\_DP3&ds\_name=DEC\_2000\_SF3\_U&geo\_id=04000US06> (visited Mar. 10, 2005).

110. U.S. Census Bureau, *Labor Force Status and Employment Characteristics: 1990: California*, (1990) at <factfinder.census.gov/servlet/QTTable?\_bm=n&\_lang=en&q\_r\_name=DEC\_1990\_STF3\_DP3&ds\_name=DEC\_1990\_STF3\_&geo\_id=04000US06> (visited Mar. 10, 2005).

111. See Dean Takahashi, *Real O.C. Boom Was in the '60s; Labor: The Number of Low- and High-wage Jobs in the Service Industry Rose from 1980 to 1990, as Manufacturing Decreased in Importance*, L.A. TIMES, ORANGE COUNTY EDITION, May 11, 1992, at D1. The slight drop in the number of women in the labor force since 1990 can, of course, also be explained by factors other than discrimination at work.

112. INSTITUTE FOR WOMEN'S POLICY RESEARCH, *supra* at 28 n.96. The national average is 36.2%.

than the national average of 26.8% in 1990 and 20.7% in 1980.<sup>113</sup> In 2000, 24.8% of women in California held a four-year college degree, also 2% above the national average.<sup>114</sup>

Claims of discrimination based on pregnancy have risen slightly and relatively continuously in California over the last few years. In 2000, California's Fair Employment and Housing Commission recorded 895 such claims.<sup>115</sup> This number rose to 991 the following year, then to 1091 in 2002 before dropping to 1008 in 2003.<sup>116</sup> It is not clear, however, that this number reflects an actual increase in discrimination or an increase in the awareness that a remedy is available. The latter case would actually suggest that women are less likely to put up with discrimination, thus possibly leading to its overall decline. In any case, the figures are roughly consistent with the national data maintained by the federal Equal Employment Opportunity Commission, which recorded an increase from 3385 to 4689 in the period from 1992 to 2003.<sup>117</sup>

The wage ratio between women and men in California is also similar to Germany's. If all working Californian women are measured against only non-Hispanic white men, the ratio is just 63.2%, forty-fifth in the nation and lower than all white-collar women in Germany.<sup>118</sup> However, this average ratio takes into account California's large number of Hispanic women, whose wages tend to be much lower than those of whites, Asian-Americans, and African-Americans; the wage ratio of the latter three together would approximate the national average of 67.5% (which is also close to the German average).<sup>119</sup> Measuring all women against all men in California results in a wage ratio of 80.7%, significantly higher than that of Germany.<sup>120</sup>

One major area of difference with respect to Germany is the number of mothers who return to work. As noted above, only one-half of German

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113. Stuart Silverstein, *Census Finds More Women In High Jobs*, L.A. TIMES, Jan. 29, 1993, at A1.

114. Institute for Women's Policy Research, *Percent of Women Aged 25 and Over with a Four-Year College Degree or More*, at <[www.iwpr.org/States2004/PDFs/data4.pdf](http://www.iwpr.org/States2004/PDFs/data4.pdf)> (visited Mar. 10, 2005).

115. State of California, Department of Fair Employment and Housing, *Department Statistics*, at <[www.dfeh.ca.gov/Reports/Stats.asp](http://www.dfeh.ca.gov/Reports/Stats.asp)> (visited Mar. 10, 2005).

116. *Id.*

117. U.S. Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges, EEOC & FEPAs Combined: FY 1992 - FY 2003*, at <[www.eeoc.gov/stats/pregnanc.html](http://www.eeoc.gov/stats/pregnanc.html)> (visited Mar. 10, 2005).

118. INSTITUTE FOR WOMEN'S POLICY RESEARCH, *supra* at 26 n.96..

119. *Id.*

120. *Id.* at 23.

mothers ever return to work,<sup>121</sup> and under 20% before the youngest child is three years old.<sup>122</sup> In the United States, by contrast, 55.7% of women with children under the age of three were employed in 2002, and 74.8% of women with children between the ages of six and seventeen.<sup>123</sup> One major reason for the large number of working mothers is simply money:<sup>124</sup> unlike their German counterparts, U.S. mothers do not receive subsidies and allowances so generous that they are tempted to stay home.

As in Germany, the birthrate in California is declining, and is now nearly at the German level among non-Hispanic white women.<sup>125</sup> But California's population is projected to rise from approximately 32 million in 2000 to 34 million in 2005 and 41 million in 2010.<sup>126</sup> Much of this growth is to come from immigration—from other U.S. states as well as foreign countries. In 2000, only 50.2% of Californians were born in the state, 22.5% came from other U.S. states,<sup>127</sup> and 26.2% came from outside the country altogether.<sup>128</sup> This represents an increase in immigration since 1990, when 59.2% were born in California and only 21.7% were foreign born.<sup>129</sup> While the overall birthrate is declining slowly, it is still highest among Latin Americans—who also make up the largest group of non-U.S. immigrants.<sup>130</sup> Their birthrate also declines in post-immigrant generations,

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121. Fischer, *supra* at 43 n.103..

122. See Dürr, *supra* at 49 n. 99.

123. Bureau of Labor Statistics, *Employment status of women by presence and age of youngest child, marital status, race, and Hispanic origin*, at <[www.bls.gov/cps/wlf-tables6.pdf](http://www.bls.gov/cps/wlf-tables6.pdf)> (visited Mar. 10, 2005).

124. See Margot Slade, *Earning It: Have Pump, Will Travel*, N.Y. TIMES, Dec. 14, 1997, at 3-12.

125. Public Policy Institute of California, *California's Future Population Growth May Be Less Than Expected, Study Finds* (Press Release), (2001) at <[www.ppic.org/main/pressrelease.asp?i=298](http://www.ppic.org/main/pressrelease.asp?i=298)> (visited Mar. 10, 2005). California's birthrate currently stands at 1.5 children per couple among non-Hispanic whites.

126. U.S. Census Bureau, *Projections of the Total Populations of States: 1995-2025*, at <[www.census.gov/population/projections/state/stpjpop.txt](http://www.census.gov/population/projections/state/stpjpop.txt)> (visited Mar. 10, 2005).

127. U.S. Census Bureau, *Profile of Selected Social Characteristics: California: 2000*, at <[factfinder.census.gov/servlet/QTTable?\\_bm=n&\\_lang=en&q\\_r\\_name=DEC\\_2000\\_SF3\\_U\\_DP2&ds\\_name=DEC\\_2000\\_SF3\\_U&geo\\_id=04000US06](http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&q_r_name=DEC_2000_SF3_U_DP2&ds_name=DEC_2000_SF3_U&geo_id=04000US06)> (visited Mar. 10, 2005).

128. *Id.*

129. U.S. Census Bureau, *Social Characteristics: 1990: California*, at <[factfinder.census.gov/servlet/QTTable?\\_bm=n&\\_lang=en&q\\_r\\_name=DEC\\_1990\\_STF3\\_DP2&ds\\_name=DEC\\_1990\\_STF3\\_U&geo\\_id=04000US06](http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&q_r_name=DEC_1990_STF3_DP2&ds_name=DEC_1990_STF3_U&geo_id=04000US06)> (visited Mar. 10, 2005).

130. *Id.* (Latin Americans as largest immigrant group in California); State of California, Department of Health Services, *General Fertility Rates, Total Fertility Rates, and Birth Rates by Age and Race/Ethnic Group of Mother, California, 2000-2003*, at <[www.dhs.ca.gov/hisp/chs/OHIR/vssdata/2003data/03Ch2Ex/2-02-2003.xls](http://www.dhs.ca.gov/hisp/chs/OHIR/vssdata/2003data/03Ch2Ex/2-02-2003.xls)> (visited Mar. 10, 2005). Three-point-five children per couple for Hispanics, 2.0 for African-American, Asian and Pacific Islander, and 1.5 for non-Hispanic white women. See also Public Policy

but remains higher than that of non-Hispanic whites.<sup>131</sup>

Unlike Germany, the United States is emphatically an immigration country, with California one of the principal beneficiaries (or victims, as some would maintain). Even if the United States were to cut off immigration entirely, California would continue to attract out-of-state U.S. citizens with its climate, economic opportunities, and, potentially, social policies. Unlike Germany's potential immigrants from within the quasi-federal European Union, these new Californians would most likely already speak and possess an education in California's official language. These facts and data suggest that California can continue to provide more (paid) maternity leave and benefits without risking Germany's population drop—in California the concern is too many, not too few residents.

#### **IV. Lessons: What can California learn from the German model and experience?**

Germany, as an independent state, and California, as a state within a federal system, have divergent needs and goals. Even within the narrow area of pregnancy and maternity leave, the divergent histories and attitudes of Germany and California lead to different views of the same issue. Both share the goal of preventing discrimination against pregnant women and mothers at work. This goal encompasses not only protection against termination, but also enabling the mother (and father) to have both the career and the children that they choose to have—without forcing a choice between one and the other.

Germans have long been aware of the impending crisis in their system of social security and have thus formulated many proposals to avert it. However, the only ideas that gain mainstream acceptance rest on the assumption that social benefits will be retained at or near current levels.<sup>132</sup>

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Institute of California, *supra* n.125.

131. Public Policy Institute of California, *supra* n.125.

132. For example, the recently created *Allianz für die Familie* (Alliance for the Family), a consortium of industry, trade associations, and government, is currently addressing the balance between equal employment rights and the need for more children. It has already begun initiatives in the areas of corporate culture, organization of work, work times, human resources development, and family-supporting services. However, its focus so far is on what companies themselves, not the government, can do, and its efforts are too recent for an assessment of their results. Bundesministerium für Familie, Senioren, Frauen und Jugend [Federal Ministry for Family, Senior Citizens, Women and Youth Affairs], *Die "Allianz für die Familie": Familie bringt Gewinn [The "Alliance for the Family": Profiting with Families]*, (F.R.G. 2004) at <[www.bmfsfj.de/Politikbereiche/Familie/familie-und-arbeitswelt,did=11408.html](http://www.bmfsfj.de/Politikbereiche/Familie/familie-und-arbeitswelt,did=11408.html)> (visited Mar. 10, 2005). Privately, women's groups have also begun initiatives to increase the enrollment of women in business and engineering courses of study, and to ensure their success once there. See Bruhns, *supra* at 85 n.91.

Since California has no need to provide benefits at those levels, these German ideas are of little relevance, and California will have to draw its own lessons from Germany's past experience.

The first main lesson California can draw from the German experience is that more generous benefits do not in themselves keep women from working and do not lead to greater wage disparity between men and women. The second, however, is that too-generous benefits combined with conservative workplace attitudes may keep women from reaching higher employment levels and closing the gender wage gap. California can also learn from both the German and its own experiences that encouraging women to work may have a negative effect on the birthrate. California can disregard this lesson, however, as long as it continues to attract workers from out of state.

For California, introducing elements of Germany's historically "paternalistic" system may seem at odds with its own historical purpose of freeing women from discrimination in a male-dominated working world. As noted above, however, early proponents of greater rights for working women specifically invoked the European model as one recognizing both women's employment rights and protection of their biologically determined family role.<sup>133</sup> Moreover, enabling—or even encouraging—working women to fulfill this role is not in itself discriminatory, provided that the women are still enabled or encouraged to continue working.

Two significant boundaries would restrict any of California's attempts to introduce elements of the German system. The first is the current (and chronic) budget shortfall in a referendum-ridden state with a strong anti-tax lobby. Any measures would thus have to assume the form of incentives, subsidies, insurance, or regulation with little visible effect on the budget. Imitation of Germany's generous parental and child allowances would be impossible both financially and politically. The second boundary is the race to the top: the measures may burden businesses to a greater extent than they would attract skilled workers, a situation which could result in an exodus of businesses and their tax dollars from the state. Unlike Germany, however, California need not maintain a particular birthrate. Instead, it can rely on immigration from out of the state, and can therefore run the risk that its policies succeed too well in encouraging women to work, to stay home, or to do both.

With these restrictions in mind, some elements of the German system do appear feasible in California, at least as adapted to California's circumstances (and many have already been implemented by companies

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133. HOBBLE, *supra* at 127-28 n. 52.

wishing to attract skilled workers). One is a change in attitude. The state and its people could follow Germany's lead in respecting both pregnancy and the right to work, rather than viewing the former as a potential nuisance to the latter. Germany's experience, however, also cautions that this balance is not an easy one to strike, and that promoting pregnancy and motherhood too much may denigrate the right to work. In addition, it is not clear how the state is to effect a change in attitude—other than by implementing concrete policies that foster such a dual respect among its populace.

One such concrete option is the extension of the pregnancy disability leave period from four months to six, giving the mother more time to bond with her child—and recover from the pregnancy and childbirth—without substantially increasing the employer's burden.<sup>134</sup>

Another option would be to follow Germany's recent granting of a right to work part time after having a child. This right would enable women to keep up with developments in their professional field, thus maintaining their value on the job market, while also keeping up with their children's development. Along the same lines, the state could provide incentives for companies that enable new mothers to telecommute and thus provide the same benefits as part-time work.

Finally, and perhaps most importantly, California could follow Germany's example in offering many of these same benefits—such as six-months of leave for the birth of a child, subsequent part-time employment and/or telecommuting—to working fathers as well, thereby enabling mothers to return to work as soon as possible. Germany's example indicates that not many fathers will take advantage of these opportunities, but as women achieve greater parity at the workplace and society becomes more accepting of stay-at-home dads, many may at least desire the option. From an anti-discrimination perspective, this measure would demonstrate that either parent can be the breadwinner and either can raise the children. From a race-to-the-top perspective, it also may help tilt the scales in favor of California for families who want the greatest possible degree of flexibility in ordering both their professional and family lives.

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134. This alternative was also recommended as an amendment to the FMLA by Victoria Riede in Note, *Employer Discrimination on the Basis of Pregnancy: Righting the Power Imbalance*, 27 GOLDEN GATE U. L. REV. 223, 247 (1997).

